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IN THE

Supreme Court of the United States

October Term, 1954
No. 674

R. H. OSBRINK, M. E. OSBRINK, and BERTON W. BEALS, as Trustee, co-partners, doing business under the firm name and style of R. H. OSBRINK MANUFACTURING COMPANY,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

HOMER D. CROTTY,
634 South Spring Street,
Los Angeles 14, California,
Attorney for Petitioners.

FRANK M. BENEDICT,
458 South Spring Street,
Los Angeles 13, California,

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
634 South Spring Street,
Los Angeles 14, California,
Of Counsel.

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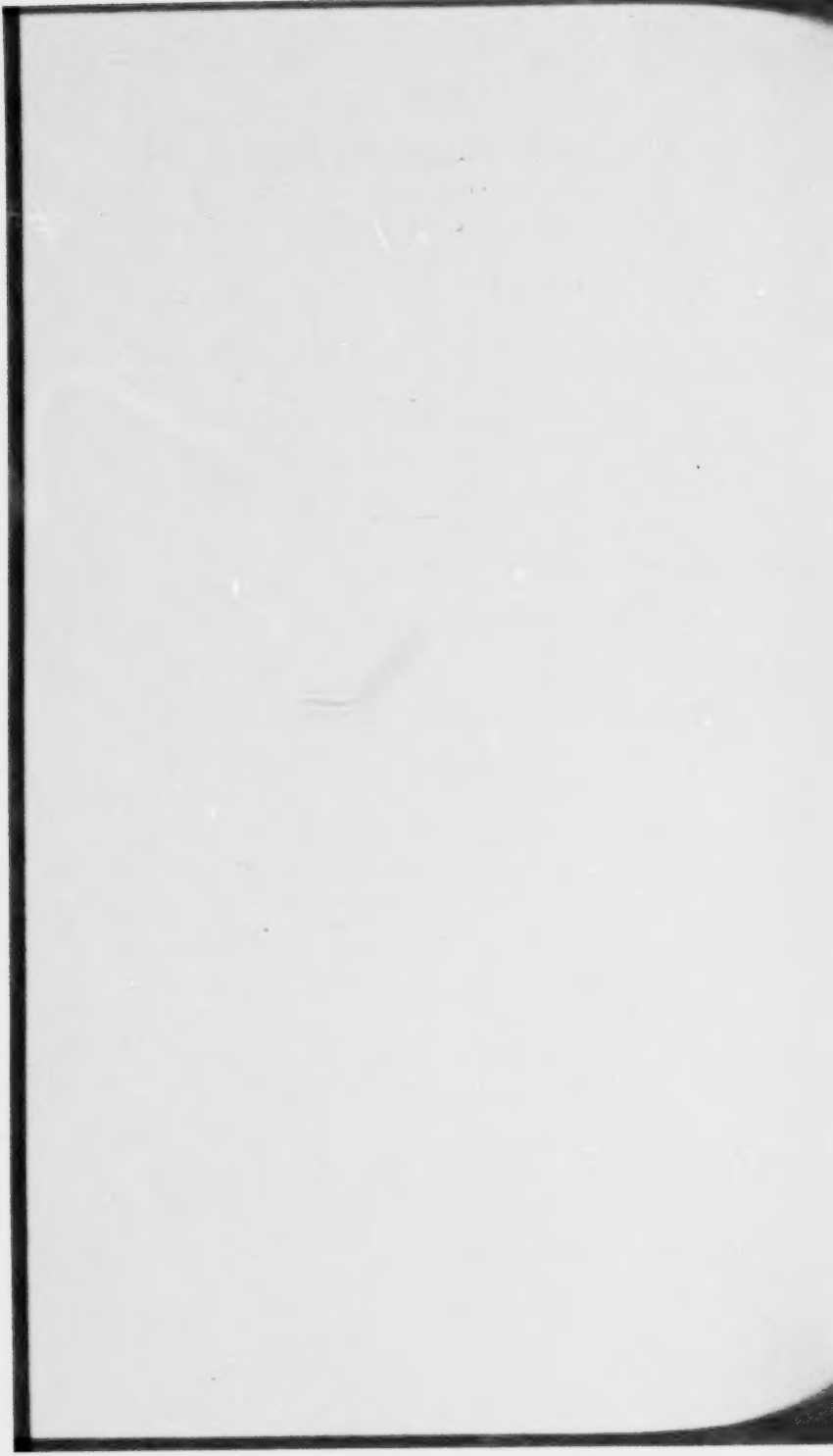

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IN THE

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October Term, 1954

No. .....

R. H. OSBRINK, M. E. OSBRINK, and BERTON W. BEALS, as Trustee, co-partners, doing business under the firm name and style of R. H. OSBRINK MANUFACTURING COMPANY,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, R. H. Osbrink, M. E. Osbrink, and Berton W. Beals, as Trustee, co-partners, doing business under the firm name and style of R. H. Osbrink Manufacturing Company, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit (entered in the above case on December 20, 1954) which affirms in part a Decision of the National Labor Relations Board made in a consolidated proceeding, and grants enforcement of the Order of the National Labor Relations Board against Petitioner.

Opinions Below.

The consolidated proceeding was first heard before a Trial Examiner of the National Labor Relations Board whose Intermediate Report and Recommended Order is set forth in the record at R. 23 to R. 62.

The Opinion of the National Labor Relations Board, which accepts all of the recommendations of the Trial Examiner, appears in the record at R. 75 to R. 84. The Board subsequently made a Supplemental Decision and Order which appears in the record at R. 100 to R. 105. The Board's Decision is reported at 104 N. L. R. B. 42, and the Supplemental Decision at 106 N. L. R. B. 16.

Upon the Board's Petition for Enforcement of its Order against Petitioner, the Court of Appeals for the Ninth Circuit made its Decision [R. 505-514] which grants full enforcement of the Board's Order. The Decision of the Court of Appeals is reported at 218 F. 2d 341, and a copy thereof is appended hereto (App. pp. 1-13). A timely Petition for Rehearing was denied by the Court of Appeals without comment on February 23, 1955 [R. 519].

Statement of Grounds on Which the Jurisdiction of This Court Is Invoked.

The jurisdiction of this Court is invoked under the National Labor Relations Act as amended. Chapter 120 of the Act of June 23, 1947, 61 Stat. 136, 29 U. S. C., Sections 151-168. The Decision of the Court of Appeals for the Ninth Circuit was entered on December 20, 1954 (App. p. 13). The Order denying the timely Petition for Rehearing, which said Petition was made by Petitioner here, was dated and entered on February 23, 1955 [R. 519].

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Questions Presented for Review.

The questions stated below present a problem which is most fundamental to our system of law enforcement through administrative agencies. That problem is to acquire observance of constitutional and statutory rights of those affected, and still not impede administrative discretion. The problem is a critical one because of the administrative policy of expedition. It becomes much more critical in view of the judicial policy of giving nearly controlling weight to the administrative decision. The United States Supreme Court in *Universal Camera Corp. v. N. L. R. B.* (1951), 340 U. S. 474, 95 L. Ed. 456, explained that the "mandate" of the 1947 Amendments was for a full hearing before the Board and an enlarged scope of review. An examination of the decisions below demonstrates that the need for review of these questions is as great now as it was at the time of that decision. We do not present any question which involves a review of factual findings or of evidence supporting the findings. We present only questions involving basic and fundamental principles.

First Question.

Section 10(b) of the National Labor Relations Act, 29 U. S. C. A., Section 160(b), 61 Stat. 146 (App. pp. 14-15), provides that no complaint may issue upon *any* unfair labor practice occurring more than six months prior to the filing of the charge alleging the unfair labor practice. Can this be construed as permitting the issuance of a complaint alleging as an unfair labor practice certain events which occurred more than six months prior to the issuance of the complaint, when (1) no charge alleging said unfair labor practice had ever been filed, and

(2) such allegations of the complaint do not define or fairly relate to the allegations of a charge which had been filed within six months of the occurrence of said events?

Second Question.

May the Court grant full enforcement to an order of the National Labor Relations Board which (1) enjoins the Petitioner from engaging in conduct for which the Court expressly states Petitioner is not responsible, and (2) which enjoins Petitioner from engaging in any type of violation of the Act whatsoever when the only violations of the Act which the Court affirms are the discharge of two employees and a promise of benefits to employees?

Third Question.

May the Court affirm a finding of the Board that two employees had been discharged for Union activity, *when such finding is based only on the Board's disbelief of the employer's testimony* and *not* upon *any* affirmative evidence, the Board's General Counsel having the burden of proving that the discharges were motivated by Union activity?

Fourth Question.

May the Court affirm an order of the Board where two of the three findings upon which that order is based are overruled by the Court and where the Court's affirmance is based upon an additional finding which the Board had not made?

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Statement of the Case.

A. The Charge and the Complaint.

The Charge was filed on January 16, 1952, and alleged only that Petitioner was engaging in unfair labor practices "within the meaning of Section 8(a), subsections (1) and (3) of the National Labor Relations Act . . ." by "discharging and discriminating against the following employees: John L. LeFlore, Jr., Benny I. Pratt, for their activities in behalf of the International Union UAW-CIO" [R. 3-5]. The First Amended Charge was thereafter filed on January 21, 1952, by the same party and merely added the name of LeRoy Jones [R. 5-7]. The Second Amended Charge was filed March 4, 1952, by the same party and merely added the name of Archie Plummer as another employee who had been allegedly discharged illegally [R. 8-9].

The Board's Complaint was issued by the Regional Director on July 25, 1952 [R. 15-18]. The Complaint alleged unfair labor practices in the discharge of John L. LeFlore, Jr., and Archie Plummer [par. 5, R. 17]. The Complaint alleged further unfair labor practices [par. 4, R. 16] on the part of Petitioner in that Petitioner had allegedly interfered with, restrained and coerced its employees by the following acts and statements:

(a) Questioning employees with respect to union membership and activities.

(b) Threatening to close down the plant in the event of the Union's election as bargaining representative of the employees.

(c) Threatening to discharge employees because of their union activities.

(d) Discharging employees because of their union activities.

(e) Threatening the employees with loss of benefits in the event the Union successfully organized the employees of Respondent's plant.

(f) Offering benefits and rewards to the employees if they would withhold their support from the Union.

(g) Undermining the Union in the eyes of the employees.

With the exception of the allegation contained in paragraph 4(d) of the Complaint (discharge of employees), none of the remaining allegations had ever been set forth in any charge which had been filed with the Board or served on Petitioner [R. 77, 3-9 and 511], and all relate to matters which had occurred more than six months prior to the issuance of the Complaint [R. 511, App. pp. 9-10].

B. The Intermediate Report.

The Trial Examiner issued his Intermediate Report and Recommendations on January 15, 1953 [R. 23-62]. He found that John L. LeFlore, Jr., and Archie Plummer had been discriminatorily discharged within the meaning of Sections 8(a)(3) and 8(a)(1) of the Act [R. 47, 55]. The only other unfair labor practices which the Trial Examiner found, all of which were found to be violations of Section 8(a)(1) were in full as follows:

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(1) A statement by Derry Smith (found to be a supervisor) that Petitioner would close the plant if the Union won the election [R. 35-36].

(2) A statement by Derry Smith that Respondent would withdraw certain privileges if the Union won the election [R. 36].

(3) A statement of Derry Smith to an employee that he was slated for discharge for Union activities [R. 47].

(4) A statement by Derry Smith to the effect that LeFlore would not be rehired since he had been seen passing out Union pamphlets [R. 47].

(5) A statement by Derry Smith and Wally Watkins (also found to be a supervisor) to the effect that LeFlore's discharge was for Union activity [R. 47].

(6) The speech of Mr. Osbrink to the employees on January 24, 1952, which was found to contain a promise of benefit if employees would reject unionization [R. 30].

The Trial Examiner rejected Petitioner's contention that Derry Smith and Wally Watkins were not supervisors. The Court of Appeals later held his finding to be erroneous.

The Trial Examiner expressly found that the allegation of paragraph 4(a) of the Complaint, questioning employees with respect to Union membership, had not been proved [R. 36-37]. He also stated, apparently with

reference to subparagraph 4(g) of the Complaint that he would not make findings pursuant to such "catchall phrases" [R. 122-126].

C. The Board's Decision and Supplemental Decision.

The Petitioner filed timely Exceptions to the Intermediate Report and a Brief [R. 62-75]. The Board's Decision approved all of the findings of the Trial Examiner and overruled all of Respondent's Exceptions [R. 75-84].

D. The Decision of the Court of Appeals.

The Board thereafter filed its Petition for Enforcement with the Court of Appeals for the Ninth Circuit [R. 112-114]. After hearing, the Court entered its Decision which affirmed the finding that John L. LeFlore, Jr., and Archie Plummer had been discriminatorily discharged [R. 507, 508; App. pp. 3-5]. The Court also affirmed the finding that the talk of Mr. Osbrink to employees on January 24, 1952, was a violation of Section 8(a)(1) of the Act in that it contained a promise of benefit if the employees rejected unionization [R. 510; App. p. 8]. However, the Court expressly rejected the Board's finding that Derry Smith and Wally Watkins were supervisory employees [R. 508; App. pp. 5-6]. The Court further stated that neither Derry Smith nor Wally Watkins had been authorized to speak or act for management [R. 508-509; App. p. 6]. Since all of the violations of the Act which the Board found had been committed, other

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than the discharges and Mr. Osbrink's talk, were predicated completely upon the Board's finding that Smith and Watkins were supervisory employees, it must be concluded that the Court overruled all of those findings of unfair labor practices. In other words, the only findings of unfair labor practice which the Court of Appeals affirms are (1) the discharge of LeFlore and Plummer as violating Sections 8(a)(3) and (1); and (2) Mr. Osbrink's talk of January 24, 1952, on the subject of unionization.

Petitioner's Petition for Rehearing in the Court of Appeals was subsequently denied on February 23, 1955 [R. 519]. The Decree of the Court of Appeals [R. 515] which was entered March 9, 1955, is exactly the same as the Order which the Board had itself made [R. 80-84].

On Petitioner's motion the Court of Appeals issued a stay of its mandate on the condition that Petition for Certiorari be filed by March 31, 1955.

ARGUMENT.

(In amplification of the reasons for allowance for the Writ.)

I.

The Decisions Below Effectively Destroy Section 10(b) as a Statute of Limitations by Permitting the Litigation of Matters Occurring More Than Six Months Before They Were First Alleged.

As previously pointed out, five of the six independent violations of Section 8(a)(1) of the Act which the Board found had been committed (*supra*, p. 7) were completely dependent upon the subsidiary finding that Derry Smith and Wally Watkins were supervisory employees and that their statements were attributable to management. In view of the Court's holding that Smith and Watkins were not supervisory employees nor acting with authority from Petitioner, the five independent violations of Section 8(a)(1) of the Act attributed to them must necessarily fall.

Thus, the only independent violation of Section 8(a)(1) of the Act which is left by the Court's decision is a talk of Mr. Osbrink to employees which was found to have contained an illegal promise of benefit in the statement that the Company would match, dollar for dollar, employee contributions to a benefit fund. The talk occurred January 24, 1952, the day before the election [R. 510, 511; App. pp. 8, 9-10]. The Complaint, which first alleged this talk to be an unfair labor practice, was issued July 25, 1952 [R. 18], more than six months thereafter [R. 511]. The Charge and two Amended Charges had, as previously explained, made no allegations except with respect to the discharge of specified employees [R. 3-9].

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It was contended to the Board and the court below that this allegation of the Complaint was barred by the six months' statute of limitation contained in Section 10(b) of the Act (App. pp. 14-15). That provision, after stating that upon the filing of a charge the Board may issue a complaint stating the charges "in that respect," states:

> ". . . *Provided,* That no complaint shall issue based upon *any* unfair labor practice occurring *more* than six months prior to the filing of *the* charge . . ." (Emphasis added.)

The Court's holding was that the allegation was not barred.

The question involved is of great importance. The six-month limitation was placed in Section 10(b) of the Act by the 1947 Amendments. The Supreme Court has not been called upon to fully interpret the provision. The rule stated by the Board [R. 78], the court below, and the various other courts of appeal (*infra,* pp. 13-14) is such as to rob Section 10(b) of any force as a statute of limitations. A full review of the problem by the Supreme Court is entirely justified.

The Court adopted the ruling that the enlarged allegation (of events which occurred more than six months before enlargement) would not be barred by Section 10(b) if the new matter "related back" or "defined more precisely" the charges which had previously been contained in a timely filed charge. Applying that theory the Court of Appeals held that the enlarged charge (the promise of benefit contained in Mr. Osbrink's talk) would stand or fall upon the evidence of violations originally charged (the discharge of LeFlore and Plummer) and that in fact

the original charges (the discharge of LeFlore and Plummer) "and the charge enlarged by the allegation in the complaint" (the promise of benefit contained in Mr. Osbrink's talk) "relate to the same acts." The Court concluded that in those circumstances the "relation back" theory was applicable and that the enlarged allegation was not barred by Section 10(b) of the Act [R. 514; App. p. 13].

The Court's application of the "relation back" theory is one which destroys any effect Section 10(b) may have as a statute of limitations. How can the new allegation of the Complaint, a talk by the Employer to employees in which he told them that if they wished to set up a benefit fund he would match it, dollar for dollar, "relate" to or "define more precisely" how the discharge of LeFlore and Plummer violated the Act?

We submit that obviously the two are not related at all and the talk relates to nothing contained in the Charge. The evidence to prove one is in no way relevant to prove the other. This is evident not only from the nature of the two matters but from the fact that neither the Trial Examiner, the Board, nor the Court used the evidence pertaining to either one in proving the allegation as to the other. In fact, the discharge of Plummer did not occur until February 29, 1952 [R. 49], long after the talk to employees. In the language of the Court of Appeals for the Third Circuit in *N. L. R. B. v. Vare* (C. A. 3, 1953), 206 F. 2d 543, "Unless the cases have taken all the teeth out of the six-months limitation provision of

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Section 10(b), it must operate to require dismissal here" (at p. 546).

We assume the rule of "relation back" as stated by the court below (but not its application) to be a correct statement of the law. The United States Supreme Court in *Radio Officers' Union v. N. L. R. B.* (1954), 347 U. S. 17, 98 L. Ed. 455, apparently endorsed the statement of the rule made by Judge Frank of the Court of Appeals for the Second Circuit in *N. L. R. B. v. Gaynor News Co.* (C. A. 2, 1952), 197 F. 2d 719. The statement made by Judge Frank in reference to Section 10(b) as applied to this situation was:

> "This section has been uniformly interpreted to authorize inclusion within the complaint of amended charges—filed after the six months' limitation period—which *'relate back'* or *'define more precisely'* the charges enumerated within the original and timely charge." (Emphasis added.)
>
> *N. L. R. B. v. Gaynor News Co.,* 197 F. 2d 719, 721.

The rule has been similarly stated by various other courts.

> *N. L. R. B. v. Gaynor News Co.* (C. A. 2, 1952), 197 F. 2d 719 (cited approvingly in *Radio Officers' Union v. N. L. R. B.* (1954), 357 U. S. 17, 98 L. Ed. 455);
>
> *Cusano v. N. L. R. B.* (C. A. 3, 1951), 190 F. 2d 898;

Stokely Foods, Inc. v. N. L. R. B. (C. A. 5, 1952), 193 F. 2d 736;

Kansas Milling Co. v. N. L. R. B. (C. A. 10, 1950), 185 F. 2d 413.

Also, we do not contend that the charge need set forth the matter alleged with the same preciseness as a complaint filed in a court of law. Nor do we question the validity of the enlarged charge here on the basis that it was contained, first, in a Complaint and was never contained in a charge, although Section 10(b) could well be interpreted as requiring that all matter be at first set forth in a charge and only thereafter be included in a complaint.

We do, however, contend that the application of this rule made by the Court of Appeals in this case manifestly is incorrect. If allowed to stand, the rule which the Court is erroneously adopting is that any new allegation is timely even though *not* related to any material contained in a timely filed charge *so long as the new allegation involves the same employer and occurred within six months of a charge which alleged some other unfair labor practice of the same employer.*

Actually, that *is* the rule which the Board erroneously adopted in this case. The Board made no test of the question on a "relation back" theory. It simply held that the new matter was not barred by the statute of limitations because the "Board is therefore free to add to its complaint allegations, unfair labor practices discovered in

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the course of its investigation, although *not* alleged in the charge, provided *only* that these did not occur more than six months before the filing and service of the original charge" [R. 78]. The application by the Court of its rule is equivalent to accepting the Board's position. Indeed, the Board made it clear in its Supplemental Decision that if it were following the "relation back" theory it would not consider the Employer's talk to employees on January 24, 1952, as being sufficiently related to the original charge [R. 103-104].

The high degree of articulation between the clauses of Sections 10(a) and (b) evidences the intent of Congress that *the particular* unfair labor practice must have been adequately alleged within the six months' period. Thus, the proviso of Section 10(b) provides ". . . That no complaint shall issue based upon *any* unfair labor practice occurring more than six months prior to the filing of *the* charge . . ." That language follows the opening clause of Section 10(b) which empowers the Board to issue a complaint ". . . stating the charges *in that respect* . . ." whenever ". . . it is charged that any person has engaged in . . . any *such* unfair labor practice . . ." The statute would be meaningless if a rule is made or applied which tolled the statute as to *all* matters upon the filing of a charge containing only allegations of *particular* unfair labor practices.

II.

The Court's Decree Cannot Stand Since It Enjoins Petitioner From Acts Which the Court Found It Had Not Committed, and Which Petitioner Has Never Threatened to Commit.

The Court's Decree [R. 515] is exactly the same form of order as the Board itself issued against Respondent [R. 80]. The Order is the usual type of "blanket" order which the Board so freely uses and which has so often been stricken down by the United States Supreme Court. As applied to the facts of this case the Order which the Decree enforces is not only grossly erroneous in enjoining Petitioner from doing acts which it has not committed, acts which it has not threatened to commit and even acts which the Court expressly found it had not committed, but it also deprives Petitioner of constitutional rights with respect to due process and a full hearing before judgment.

The most obvious and glaring error is the fact that the Court's Decree grants enforcement in paragraph 1(b) to the portion of the Order enjoining this Petitioner from threatening that union representation will result in closing of the plant and in loss of benefits. The Board included that provision in the Order because it had found that a supervisory employee (Derry Smith) had made such a threat [R. 35-36]. The Court of Appeals, however, expressly rejected the finding that Derry Smith was a supervisory employee [R. 508-509; App. pp. 5-6], so that under the Court's Decision Petitioner is not chargeable with the conduct and statements of Derry Smith. However, despite this fact, the Court's Decree enjoins Petitioner from doing what the Court says it had not done. Clearly, this is not only

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erroneous but it is in excess of the Court's jurisdiction. The judgment and Decree of the Court must bear relation to the hearing and Decision which preceded it. It suffices nothing to have the hearing and to form the judgment without regard to the results of the hearing.

Less obvious, but of even greater error and detriment to Petitioner, is the provision of Section 1(d) of the Court's Decree [R. 516]. That provision enjoins Petitioner from doing any act whatsoever which would constitute an unfair labor practice within the meaning of the Act. Under that provision of the Decree any conduct of Petitioner which hereafter may be found to have been an unfair labor practice will in addition be a contempt of court for violation of the Decree.

The only unfair labor practices which the Court affirms is violation of Section 8(a)(3) in the discharge of two employees and Section 8(a)(1) in the making of a promise of benefit to employees. The Act contains five prohibitive sections with reference to employers. Three of those sections were never at any time involved in this proceeding. Yet the Decree which the Court entered would enjoin Petitioner even from violations of those sections.

The decision of this court in *N. L. R. B. v. Express Pub. Co.* (1941), 312 U. S. 426, 85 L. Ed. 930, controls the question and requires that the decree of the Court of Appeals be vacated. In that case the only unfair labor practice findings made consisted of violations of Sections 8(5) and (1) in refusal to bargain in good faith with the bargaining agent. The Board sought to enforce a blanket order of the same effect as paragraph 1(d) of

the Decree involved here. In denying enforcement to that order, the court stated in part:

> "It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.
>
> * * * * * * * *
>
> "Refusal to bargain may be, as we think it was here, wholly unrelated to 'discrimination in regard to the hire or tenure of employment on any term or condition of employment to encourage or discourage membership in any labor organization,' all of which are unfair labor practices as defined by §8(3)."
>
> *N. L. R. B. v. Express Pub. Co.,* 312 U. S. 426, 85 L. Ed 930, 936.

To the same effect see:

May Dep't Stores Co. v. N. L. R. B. (1945), 326 U. S. 376, 90 L. Ed. 145;

N. L. R. B. v. Crompton-Highland Mills (1949), 337 U. S. 217, 93 L. Ed. 1320.

Exactly the same is true here in that the finding with respect to Section 8(a)(3) of the Act is in no way related to a refusal to bargain or violation of Section 8(a)(5). A decree which attempts to bridge the gap by such an order cannot be granted enforcement.

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This contention with respect to the scope of the Order was made to the Board [R. 85-94; 104] and to the Court of Appeals on the direct presentation of the case and on the Petition for Rehearing filed by this Petitioner. The Court, therefore, had this contention before it when it entered the Decree on March 9, 1955.

The importance of the question is increased by the obvious lack of consideration the Court gave to the Decree. The Court in effect is giving the Board unlimited authority to write its decree where it affirms any finding of unfair labor practice which the Board made. It must be recognized that it is the Board's policy that *any* finding of Section 8(a)(3) violation will result in a blanket order. Such was its holding here [R. 104] and such has been its holding elsewhere.

See:

Southeastern Pipe Line Company (1953), 104 N. L. R. B. 575.

The court below has not only approved that policy by the entering of the decree involved here, but it has given it express recognition in previous cases.

See:

N. L. R. B. v. Globe Wireless (C. A. 9, 1951), 193 F. 2d 748.

The Board's policy which the Court below approves has never been reviewed by the United States Supreme Court and seems directly in conflict with previous holdings of that Court.

III.

The Finding That LeFlore and Plummer Were Discriminatorily Discharged Was Based Solely Upon the Board's Disbelief of Petitioner's Testimony and Is Not Supported by Any Affirmative Evidence Whatsoever.

The question we present here is not whether the finding that LeFlore and Plummer were discriminatorily discharged was supported by substantial evidence on the record as a whole. The question is whether the Court of Appeals may affirm such a finding where there is no affirmative evidence to support it whatsoever and the only "evidence" relied upon is the negative inference which arises in the mind of the trier of fact when he disbelieves the testimony of the Employer as to why the employees were discharged.

The question was nicely phrased by the concurring opinion of Judge Pope in *N. L. R. B. v. Radcliffe* (C. A. 9, 1954), 211 F. 2d 309, wherein he stated:

> "Belief that a witness is lying is not a substitute for evidence that the opposite of his testimony was the fact. A witness who testified that a horse was white, in a manner and with such demeanor as to convince the tribunal that he is testifying falsely, does not thereby furnish proof of an allegation that the horse was black. A district court, furnished with nothing better than that, would have to direct a verdict against its proponent."
>
> *N. L. R. B. v. Radcliffe,* 211 F. 2d 309, 316.

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The consideration of the question presented in no way involves whether the Board's disbelief of Petitioner's testimony was proper. Also, we assume, as stated by the Court of Appeals in *N. L. R. B. v. Radcliffe, supra,* that at least some weight may be given to a failure to explain the discharges or the giving of "evasive, inconsistent or contradictory" reasons. The question is neither of those but is only whether *controlling* weight may be given to the mere disbelief of Petitioner's testimony.

It is sufficient for this point to merely examine the previous decisions to see the evidence specified as supporting the finding. The grounds upon which an administrative agency bases its findings and decisions must be clearly set forth.

> *Phelps Dodge Corp. v. N. L. R. B.* (1941), 313 U. S. 177, 85 L. Ed. 1271.

This is also the requirement of the Administrative Procedure Act, 5 U. S. C., Section 1007. For sake of clarity we will hereafter consider separately each of the decisions involved.

A. *The Trial Examiner's Recommendations.* LeFlore was discharged February 15, 1952 because of inattention to work, interfering with the work of other employees and carelessness in performance of his duties [R. 39-40]. The Petitioner gave testimony that that was the reason for LeFlore's discharge and several witnesses were presented by Petitioner to substantiate the fact that LeFlore was guilty of the shortcomings charged to him [R. 40].

Plummer was discharged February 29, 1952 [R. 323] because of the unsatisfactory performance of his duties and his poor attendance record [R. 357-358, 477-478]. Again, the Petitioner gave testimony to that effect and offered a number of witnesses to support it. Many of the witnesses called by Petitioner on the point of both LeFlore's and Plummer's discharges were rank and file employees who had no interest in the subject matter of their testimony. The Trial Examiner's Report takes up the question of LeFlore's discharge and the first five pages [R. 39-44] are restricted to a consideration of explaining why the Trial Examiner does not believe Petitioner's testimony. Nothing is stated in those five pages by way of affirmative evidence to prove that the discharge of LeFlore was for Union activity—it is merely a rebuttal against the testimony offered by Petitioner. The Trial Examiner then concludes in approximately one page [R. 44-45] that, "A more likely explanation than any of those advanced by the . . ." Petitioner was the Board's decision to hold an election, and concludes that LeFlore was discharged for Union activity. Other than disbelieving Petitioner's witnesses he predicates that conclusion solely upon the belief that (a) LeFlore was the most active in support of the Union; (b) his activity was open so there could be "no doubt" that Petitioner was advised of it (there is not a word of evidence to support that assumption); and (c) the Petitioner had a strong bias against a bargaining relationship with the Union. After coming to that conclusion the Trial Ex-

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aminer attempts to support his conclusion by considering certain statements made by Derry Smith and Wally Watkins who he found to be supervisory employees [R. 45]. Since the Court of Appeals has reversed that finding, no consideration could be given to any hearsay statements made by Smith or Watkins and apparently the Trial Examiner did not intend by referring to their statements to use them as the basis for a finding.

The consideration the Trial Examiner gave to the evidence with respect to Plummer was of the same nature as that with respect to LeFlore. He devotes the first seven pages of his consideration of the evidence [R. 47-54] to a detailed explanation of why he chooses not to believe Petitioner's testimony. He then concludes in less than a page that Plummer's discharge was motivated by his Union activity. He cites not a word of evidence to support his finding that the "real cause" for the discharge was Plummer's identification with the Union. He comes to that conclusion by the inference he draws from his disbelief of Petitioner's testimony [R. 55].

B. *The Board's Decision.* The Board's Decision [R. 75] and Supplemental Decision [R. 100] does not attempt to set forth any evidence to support these findings. The Board merely adopted the Trial Examiner's Decision with respect to that portion of the case.

C. *The Decision of the Court of Appeals.* The Court's Decision concluded on the point, after holding that no consideration could be given to the hearsay statements of

Smith and Watkins since they were not supervisory employees, as follows:

> "However, entirely apart from the managerial question, the evidence as to the heat engendered by the campaign up to the discharge of LeFlore, taken into consideration with the circumstances as to respondents' explanations of the discharges, justified the Board's finding that they were motivated by the employees' union activities." [R. 509, App. p. 6.]

Thus, even by the Court of Appeals there is an expressed admission that the only "evidence" which it can find to support these findings is that (1) a good deal of "heat" was engendered by the election campaign, and (2) the Petitioner's testimony with respect to the discharge was deficient; therefore, the Board could justifiably find that the discharge was for Union activity. We submit that the Court of Appeals erred in making that conclusion.

The question presented here has been answered by the United States Supreme Court in *Dickinson v. United States* (1953), 346 U. S. 389, 98 L. Ed. 132. That case involved a determination of whether a denial of the ministerial exemption under the Selective Service Law by petitioner's local draft board was proper. The court in its opinion noted that no judicial review of selective service classifications existed but that still the court could examine such classifications where no basis in fact existed for the classification. The local board had not believed Dickinson's evidence, but there was no other affirmative evidence

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presented. The lower court agreed with the board. In reversing the lower court on this point, it was said:

> "However, *Dickinson's claims were not disputed by any evidence presented to the selective service authorities, nor was any cited by the Court of Appeals.* The task of the courts in cases such as this is to search the record for some *affirmative evidence to support the local board's overt or implicit finding* that a registrant has not painted a complete or accurate picture of his activities. We have found none here.
>
> "Local boards are not courts of law and are not bound by traditional rules of evidence; they are given great leeway in hearing and considering a variety of material as evidence. If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply a test of 'substantial evidence.' However, the courts may properly insist that there be *some* proof that is incompatible with the registrant's proof of exemption. * * * But when the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice." (Emphasis added.)
>
> *Dickinson v. United States,* 346 U. S. 389, 98 L. Ed. 132, 138.

The precise question presented here has been considered in many cases.

In *Hazel-Atlas Glass Co. v. N. L. R. B.* (C. A. 4, 1942), 127 F. 2d 109, the same finding was involved. As in the instant case there was no direct evidence as to the

reason for the discharges and the Board rejected the testimony of the Employer. In rejecting this finding the Court of Appeals for the Fourth Circuit stated:

> "There was no direct evidence that the complainants were discharged for union activities. All the direct evidence was to the contrary; and the Board reached its conclusions by rejecting the direct evidence as false and by drawing certain inferences from the evidence that remained. It is the sufficiency of the latter evidence that must now be considered, for it is obvious that the mere rejection of the employer's denials as perjury does not take the place of affirmative evidence of wrong doing."
>
> *Hazel-Atlas Glass Co. v. N. L. R. B.*, 127 F. 2d 109, 114-115.

Additional cases holding that the burden of proof was upon the Board to prove that the discharges were illegally motivated and that the burden never shifts are:

Indiana Metal Products Corp. v. N. L. R. B. (C. A. 7, 1953), 202 F. 2d 613;

Local No. 3, etc. v. N. L. R. B. (C. A. 8, 1954), 210 F. 2d 325;

N. L. R. B. v. Kaiser Aluminum & Chemical Corp. (9 Cir., 1954), 217 F. 2d 366.

A finding of any tribunal which either admittedly or in practical effect is based only upon the negative inference arising from even a justifiable disbelief of the testimony of one not having the burden of proof, goes a long way towards destroying the concept of a fair hearing, ignores the requirement that the finding be supported by

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substantial "evidence" and thereby shifts the burden of proof to the one who was not intended to have it.

The importance to our judicial and administrative system which such a practice raises is obvious and it has been recognized by Congress. The reaction of Congress was to enact the Amendments of 1947 whereby the scope of review was enlarged and the requirement was added that the Board's decision be supported by *substantial* evidence on the record *as a whole*. The United States Supreme Court has held that the Congressional Amendments of 1947 are a mandate to the courts to exercise a more strict scrutiny in reviewing the Board's finding.

> *Universal Camera Corp. v. N. L. R. B.* (1951), 340 U. S. 474, 95 L. Ed. 456.

The defect in evidence with respect to these findings is as extreme as any of the cases which Congress considered and which led to the enactment of the Amendments. The Court of Appeals below, in recognizing that the Board's Decision was based solely upon the disbelief of Petitioner's testimony and nevertheless affirming the finding, has lapsed into a method of review which no longer complies with the "mandate" of Congress. We submit that this question is of great importance and that the Writ should be granted in order that there may be a reorientation of the type of trial and review which the Act demands.

IV.

The Order Setting Aside the Election Must Be Remanded to the Board for Reconsideration Since Two of the Three Findings Upon Which It Was Based Have Been Overruled. The Court Erred in Affirming the Order After Making Its Own Findings to Support It.

As previously stated, the proceeding is a consolidation of an unfair labor practice case and a representation case.

The Union lost the election and the Board's Order was that Petitioner had interfered with the election and that it would be set aside. The setting aside of the election was based expressly upon the findings that Petitioner had interfered with the election by (1) offering benefits to employees; (2) threats to close the plant and rescind benefits if the Union won the election; and (3) exerting pressure on employees to vote by withholding pay checks [R. 38-39]. The only finding which the Board made with respect to threats to close the plant and rescind benefits was attributed to Derry Smith whom the Board found to be a supervisory employee [R. 35-36], and which finding the Court expressly rejected [R. 508-509; App. pp. 5-6]. The Court of Appeals also rejected the finding that Petitioner had interfered with the election by withholding pay checks as a means of inducing the employees to vote [R. 510; App. p. 7].

Thus, of the three findings which were the basis of the Board's Order setting aside the election, only one remains intact. The Court of Appeals nevertheless affirmed the Order setting the election aside, stating that there was evidence sufficient to support the Order, to wit: the offer of inducements to vote against unionization and discharge

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of LeFlore for Union activity [R. 510; App. pp. 7-8]. Thus, the Court added as supporting the Order a finding of its own. The Board had not made that finding, and it is not the province of the Court to supply findings to replace those which were rejected by it. Indeed, the finding could not be made in the absence of evidence that the employees were aware of the reason for LeFlore's discharge, a matter to which no one has ever addressed himself.

The weighing of evidence and the making of findings from the evidence is the exclusive province of the Board and the Court may not make findings of fact in the first instance. It may only review findings made by the Board.

Phelps Dodge Corp. v. N. L. R. B. (1941), 313 U. S. 177, 85 L. Ed. 1271;

N. L. R. B. v. Waterman Steamship Corp. (1940), 309 U. S. 206, 84 L. Ed. 704.

With the rejection of two of the three findings upon which the Order was based, it cannot be said whether the Board would enter the same Order on the basis of the remaining finding. The only procedure open to the Court in this circumstance was not to support the Order by additional findings of its own, but to remand the matter to the Board and let the Board make the additional finding, if it could, and determine in the first instance whether the same order would be entered on the basis of the single remaining finding, if it could not. To do otherwise is to put the Court into the position of weighing the evidence and making findings.

Conclusion.

We have set forth four reasons why the Court should issue the Writ as prayed. All of the questions involve principles which are basic to the administration of the Act and represent those areas where the greatest confusion exists. The questions all involve fundamental rights of litigants as affected by the administrative process, and there is an urgent need for an examination by the United States Supreme Court to determine whether the principles it set forth in *Universal Camera Corp. v. N.L.R.B.* (1951), 340 U. S. 474, 95 L. Ed. 456, are being observed.

We respectfully and earnestly submit that for each of the reasons submitted a Writ of Certiorari should issue.

All of which is respectfully submitted.

Dated: March 24, 1955.

HOMER D. CROTTY,
Attorney for Petitioners.

FRANK M. BENEDICT,

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
Of Counsel.

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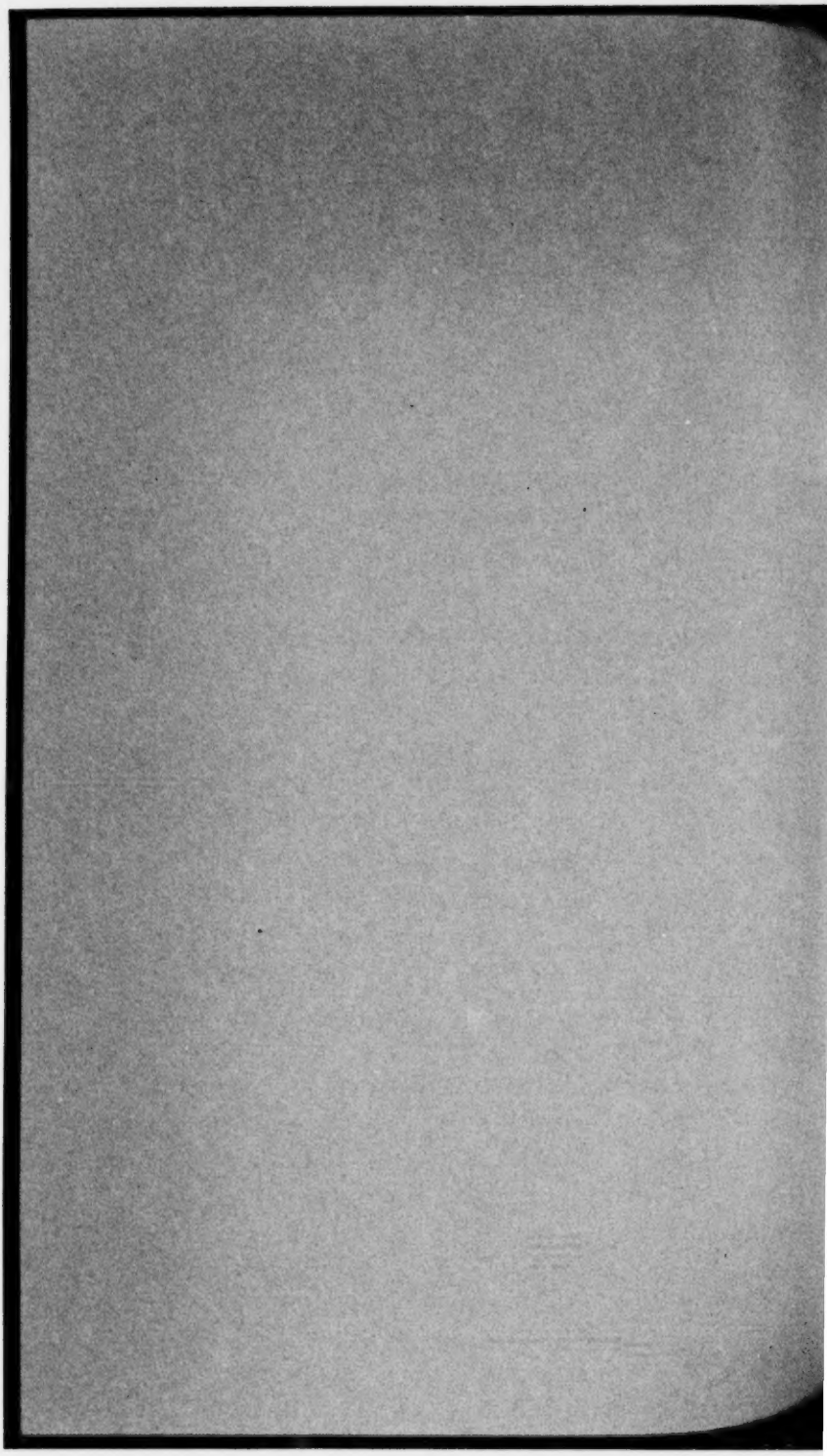

APPENDIX.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. R. H. Osbrink, M. E. Osbrink and Berton W. Beals, as Trustee, co-partners, doing business under the firm name and style of R. H. Osbrink Manufacturing Company, Respondents. No. 14,073, Dec. 20, 1954.

PETITION FOR ENFORCEMENT OF ORDER OF NATIONAL LABOR RELATIONS BOARD.

Before: STEPHENS and FEE, Circuit Judges, and LING, District Judge.

STEPHENS, Circuit Judge.

The National Labor Relations Board is before us petitioning for an order of enforcement in two separate though related proceedings which were consolidated for hearing before an examiner, and later before the board. One was a proceeding to set aside a representative election and the other was upon charges that respondent had discharged certain employees in violation of §8(a)(3) and (1) of the National Labor Relations Act (Title 29 U.S. C.A. §158) and in violation of §8(a)(1) as to certain rights guaranteed by §7 of the Act.

The examiner found in the affirmative as to the allegations of the complaint and reported to the board in favor of invalidating the election because of management interference and in favor of reinstating two discharged employees upon the finding that they had been discharged without cause and for their union activities, and ordered the posting of notices in relation to the violations of employees' rights as guaranteed by §7 of the Act.

The board approved the report and made its orders accordingly.

At the outset it is well to dispose of one issue raised by Respondent. The union involved in the proceedings is the United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (U.A.W.-C.I.O.) Region 6. Respondent makes the argument that "Region 6" is the union and charges that "Region 6" has not complied with §9(f)(g) and (h) of the Act (the anti-communist provisions). There is no such contention as to the U.A.W.-C.I.O. We reject the contention since the union involved is properly identified by its chosen name and it is apparent that "Region 6" denotes a regional part of the whole.

It appears that the Osbrink manufacturing business has been successfully conducted for some time without union organization of its employees, and that when there was activity toward unionization, the management was displeased. The upshot of the matter was that on January 2, 1952, the board called an election for January 25, 1952, at which election the proposition to authorize the union, heretofore named, as employees' representative, was defeated by a vote of 196 against, to 100 for. The campaign right up to the voting was spirited with the union adherents on the one side and management-respondent on the other.

Ten days before the election date, John LeFlore, Jr., an active outspoken pro-union employee, was handed his pay check by Wally Watkins with the statement that he was discharged. There is evidence that LeFlore asked Watkins (found by the Examiner and the Board to be

assistant to foundry superintendent James Frederick Rasp) why he was fired and that he was told that the orders came from Rasp who admittedly was foundry superintendent. Rasp was not available, so LeFlore made the inquiry of R. H. Osbrink, one of the active partners, and the latter denied knowledge of the firing and referred him to Berton W. Beals, general manager of the plant. Beals denied knowledge but two days later he told LeFlore the discharge was because "he got sand in the molds, because they could not keep track of him on his job, and because his work was unsatisfactory." A member of LeFlore's crew asked Derry Smith (found by the Examiner and the Board to be a member of management) the reason for the discharge and Smith replied that he didn't know, that he was a good worker and he would try to get him back. The next day Smith said he wouldn't try to get LeFlore back because the latter had been passing out union hand bills. Later he told LeFlore he was sorry, that he had done all he could do but that he would never be taken back since it was known that he passed out union hand bills. Ralph Edward Goynes, another member of LeFlore's crew, testified that Watkins told him (Goynes) about a week after the discharge that LeFlore was discharged for talking about the union. There was contradiction of practically all of this testimony and respondent claimed LeFlore was careless and was wandering around, and an employee testified LeFlore was away about half the time and three or four times a day a substitute would have to be made. LeFlore testified that he was continuously being sent to various parts of the plant for supplies and denied leaving his post without authorization. There was more, pro and con. The examiner and the board found the fact to be that LeFlore was discharged illegally because of his

union activity and we do not conclude that we should reverse the finding upon an over-all view of the testimony.

Archie Plummer had come into the plant as an employee in June, 1951, and he was a pro-union man and he discussed the unionization and advocated it in the plant with its anti-union employees. On January 20, 1952, Plummer sustained a back sprain and didn't report for work until February 13, 1952. On February 25, 1952, he requested and was granted by Uries Stephen Walker, his leadman (Walker should be distinguished from Watkins), absence for a day because of a cold. Plummer returned the next day and Watkins asked why he was absent, and Plummer explained that he had been granted permission. At the end of the work day Watkins gave Plummer his check and told him he was discharged for being off the job without reporting the absence. The discharge notice stated the discharge was because of "absenteeism and tardiness." Osbrink denied that employees were discharged for absenteeism and tardiness alone, but they were taken into account with other factors in evaluating an employee's work. There is evidence that respondent's records showed repeated absences of other employees without authorization. There is evidence also that Plummer was noticed by Rasp, plant superintendent, as a union observer during the counting of the election ballots. Plummer continued to talk unionization after returning. Respondent introduced evidence of Plummer's unsatisfactory work.

We are of the opinion that any reasonable over-all view of this evidence may well indicate that the pro-union activity was the motivating reason for the discharge, notwithstanding the testimony as to Plummer's unsatisfactory

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work. However, the examiner heard the witnesses and we see no good reason for disturbing his findings. We quote from petitioner's brief in note 2.[1]

We have briefly recited the evidence received by the examiner and the board, including the testimony which was received under the ruling that Derry Smith and Wally Watkins were supervisory employees. Respondent has all along contended that neither Smith nor Watkins had such status. We have read and studied the record from page one, the beginning, to page 502, the end, and we are of the opinion that if ever the doctrine of the *Universal Camera* case should be applied it should be applied upon this point in this case. *Universal Camera Corp. v. N.L.R.B.*, 340 U. S. 474. Every bit of testimony in the case relevant to the point indicates that Mr. R. H. Osbrink's statement that Wally Watkins was no more than Rasp's "leg man," was accurate. There is no evidence that he was authorized or ever attempted to exercise any judgment as to policy or to hire or fire, demote or promote any employee. He was a trusted employee with intelligence enough to gather information for the management's action. He was a leadman. Derry Smith was a trusted and experienced employee who acted in the

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[1]Brief of National Labor Relations Board, page 14: "At the hearing respondents introduced evidence to prove that Plummer was lax and unsatisfactory in the discharge of his duties, and amended its complaint at the end of the hearing to allege this as an additional reason for his discharge. In this connection respondents called Mose Harris who testified that when Plummer worked with him as a relief man on the shake-out crew several months before the discharge, he sat around on a box instead of performing his duties. Walker testified that Plummer was absent on two or three occasions when it was time to pour and that he had warned Plummer that one of these days, he, Plummer, was going to lose his job."

capacity of leadman and one of his duties was the breaking in of new workmen. There is no substantial evidence that he was authorized or ever attempted to speak or act for the management on any subject other than the actual conduct of the work. Both Watkins and Smith, as was said as to employees in *N.L.R.B. v. Arma Corporation*, 2d Cir., 1941, 122 F. 2d 153, were "key men" or "straw bosses" but not supervisory personnel. One fact that stands out as to our conclusion that Smith was not, is that Smith voted at the election, without protest which, of course, is inconsistent with the claim that he was of management. *N.L.R.B. v. Sculin Steel Co.*, 8 Cir., 1947, 161 F. 2d 143. However, entirely apart from the managerial question, the evidence as to the heat engendered by the campaign up to the discharge of LeFlore, taken into consideration with the circumstances as to respondent's explanations of the discharges, justified the board's finding that they were motivated by the employees' union activities.

The Election.

What we have heretofore said indicates a heated atmosphere around the plant between the call for the election, January 2, 1952, and the election, January 25, 1952. In the language of the street, "no punches were pulled." As heretofore stated, John LeFlore, Jr., an active, perhaps the most active proponent of the union among all the employees, was discharged ten days before election for union activities. A week before the election, Derry Smith (found by the board to be a supervisory employee; we find otherwise) called a shake-down crew from work and told them that respondent, Mr. R. H. Osbrink, had told him that the plant would be closed if the union won the

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election. Smith warned Goynes, an employee under him, that Osbrink would take away certain presently enjoyed privileges if the union won. After LeFlore's discharge, Smith and Wally Watkins told employees that LeFlore had been let out because of union activity. The day before the election, Mr. Osbrink assembled and spoke to the employees about the election in which he made statements to the effect that he would match dollar for dollar the employees' contribution for a general welfare fund. He added, after his attorney had instructed him to do so, that his offer held whether the union won or lost. The situation was one in which fear of reprisal from management might well have prevented a free choice at the election.

The election was held in the afternoon and the employees were released before quitting time. Busses were furnished by management to take the men to the polls. It was pay-day, but the men were not paid as they left work, as was the custom. It is in evidence that the men got their checks later, and there is no evidence that any discrimination was made as between those who voted or those who refrained. The examiner and the board regarded this instance as evidence of interfering with the election. We note with approval that counsel in his brief pays no attention to this incident. Respondent deserves commendation rather than adverse criticism for facilitating the voting.

Viewing the situation as a whole, however, and without consideration of expressions attributed to management through the board's finding that Smith and Watkins were supervisory employees, we think there is evidence sufficient to support the board's basis for its order invalidating

the election, to-wit: the offer of inducements to vote against unionization, discharge of LeFlore for union activity.

We have alluded to Mr. Osbrink's speech to the employees the night before election. Respondent contends that there is nothing in it which is illegal and, anyway, it was error for the examiner to refuse respondent's offer to the whole speech in the record. We think the whole speech should have been received, but the part as to promise of matching dollar for dollar for a welfare fund, connected with the speech which was anti-union on the eve of the election, constituted in itself an interference with the employees' right to organize.

It will be recalled that the board in its complaint, in addition to the formal charges presented to the board, charged respondent with having violated §8(a)(1) of the Act. That is, upon the evidence as to the discharges and as to the election, the respondent had "interfered with" etc. the employees' rights as provided in §7 of the Act. If this additional charge was properly in the complaint as an issue, it is quite apparent that the evidence sustains the charge. Whether it was properly in the complaint depends in large measure as to the proper significance of §10(b) of the Act.

The first part of this section (§10(b)) authorizes the issuance of a complaint in certain instances, then it is

> "Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

The formal charges which start the investigatory powers of the board in motion toward the issuance of a complaint,

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if the board deems such action advisable, were limited to the discharge of and discrimination against employees in violation of §8(a)(1) and (3) of the Act. After its investigation the board issued its complaint in which the respondent was alleged to have violated the Act as the charges indicated but added an allegation accusing respondent of having violated §8(a)(1) by interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in §7 of the Act, in the following particulars:

"(a) Questioning employees with respect to union membership and activities.

"(b) Threatening to close down the plant in the event of the Union's election as bargaining representative of the employees.

"(c) Threatening to discharge employees because of their Union activities.

"(d) Discharging employees because of their Union activities.

"(e) Threatening the employees with loss of benefits in the event the Union successfully organized the employes of Respondent's plant.

"(f) Offering benefits and rewards to the employees if they would withhold their support from the Union.

"(g) Undermining the Union in the eyes of the employees."

And it is alleged these violations began about November, 1951, and continued up to date of the complaint. The charges, as amended the second time, were dated March 4, 1952. The complaint was filed July 25, 1952, and it

is not contended that any of the acts allegedly constituting violations of the Act occurred within six months of the latter date.

Therefore, respondent contends, it is clear that the six month limitation is applicable. On the other hand, all of the alleged acts were less than six months old when the charge was presented to the board. The board seeks to avoid the six month limitation by applying the "relating back" theory. As was said in *N.L.R.B. v. Gaynor News Co.*, 2 Cir., 1952, 197 F. 2d 719, 721:

> "This section [§10(b) of the Act, 29 U.S.C.A. §160(b)] has been uniformly interpreted to authorize inclusion within the complaint of amended charges —filed after the six months' limitation period—which 'relate back' or 'define more precisely' the charges enumerated within the original and timely charge."

And this court, in *N.L.R.B. v. Globe Wireless*, 9 Cir., 1951, 193 F. 2d 748, 752, approved the relating back theory. The case was, in principle, the same as the instant one with the exception that the enlargement of the charge in the complaint was within six months of the acts complained of. In the instant case the acts were committed more than six months before the complaint was enlarged. It is true that the court intimated in its opinion in the *Globe Wireless* case that the relating back theory would not be applied in such a case. It is apparent, however, that the facts in that case brought the commission of the acts within the six months of the enlargement. It, of course, follows that the intimation was on a phase

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of point not before the court. The relating back theory was discussed in *N.L.R.B. v. Vare,* 3 Cir., 1953, 206 F. 2d 543, 546, in circumstances different from the *Globe Wireless* case and the instant one as well, and the differences will be noticed in a short quotation from the *Vare* opinion:

> "The 'amended' charges here are really new and different charges alleging new and different unfair labor practices against a *new and different* respondent." [Emphasis added.]

The new charges were dismissed. But the same court that decided the *Vare* case had the case of *Cusano v. N.L.R.B.,* 3 Cir., 1951, 190 F. 2d 898 before it. In *Cusano,* the amended and different charge related to practices antedating six months prior to the original charge and of course including the filing of the complaint. Yet it was held good on the relating back theory, since the amended charge rested upon the same acts as those in the original charge. The court's reasoning was not put beside the text of the section 10(b) of the Act, but was the result of reasoning generally that the charge could relate back because the employer would not be prejudiced since he would "retain pertinent records, interrogate witnesses and, in a general way prepare his defense" to the unfair labor practices complained of in the charge. The same is true in our case.

In *N.L.R.B. v. Dinion Coil Co.,* 2 Cir., 1952, 201 F. 2d 484, a complaint was filed including employees in addition to others who allegedly had been discriminately dis-

charged. The original charge was made within the six months limitation but the enlarged charges by the complaint were without the limitation. The relating back theory was applied because all of the charges were closely related. See, also, to much the same effect *N.L.R.B. v. Pecheur Lozenge Co.*, 2 Cir., 1953, 209 F. 2d 393. See, also, *N.L.R.B. v. Kobritz,* 1 Cir., 1951, 193 F. 2d 8. Much broader reasoning in applying the relating back theory will be found in *Kansas Milling Co. v. N.L.R.B.,* 10 Cir., 1950, 185 F. 2d 413, and in *Cathey Lumber Company v. N.L.R.B.,* 5 Cir., 1951, 185 F. 2d 1021, and *Stokely Foods Inc. v. N.L.R.B.,* 5 Cir., 1952, 193 F. 2d 736; see also *N.L.R.B. v. Bradley Washfountain Co.,* 7 Cir., 1951, 192 F. 2d 144. We quote from *National Licorice Co. v. N.L.R.B.,* 1940, 309 U. S. 350, 369:

> "It is unnecessary for us to consider how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequest proceedings matters existing when the charge was filed, but not included in it. Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. The violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company

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> union and to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. We think the court below correctly held that 'the Board was within its power in treating the whole sequence as one.' "

The limitation proviso was not in effect in that case, but the general subject of relating back is treated.

In our case at hand, the evidence, pro and con, relevant to violations of the labor Act and as well to the election contest, is relevant to the enlarged charge in the complaint. The enlarged charge must stand or fall upon the evidence as to the violations originally charged. In fact, the original charges and the charge enlarged by the allegation in the complaint relate to the same acts. In these circumstances, we think the relation back theory is applicable by its general application and operation of the proviso to §10(b) of the Act.

We are of the opinion and hold that the allegations in paragraph 4 of the complaint are timely, and were proved.

Our order of enforcement will follow.

(Endorsed:) Opinion. Filed Dec. 20, 1954. Paul P. O'Brien, Clerk.

EXCERPT FROM NATIONAL LABOR RELATIONS ACT,
61 Stat. 146, 29 U. S. C. A. Section 160.

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any

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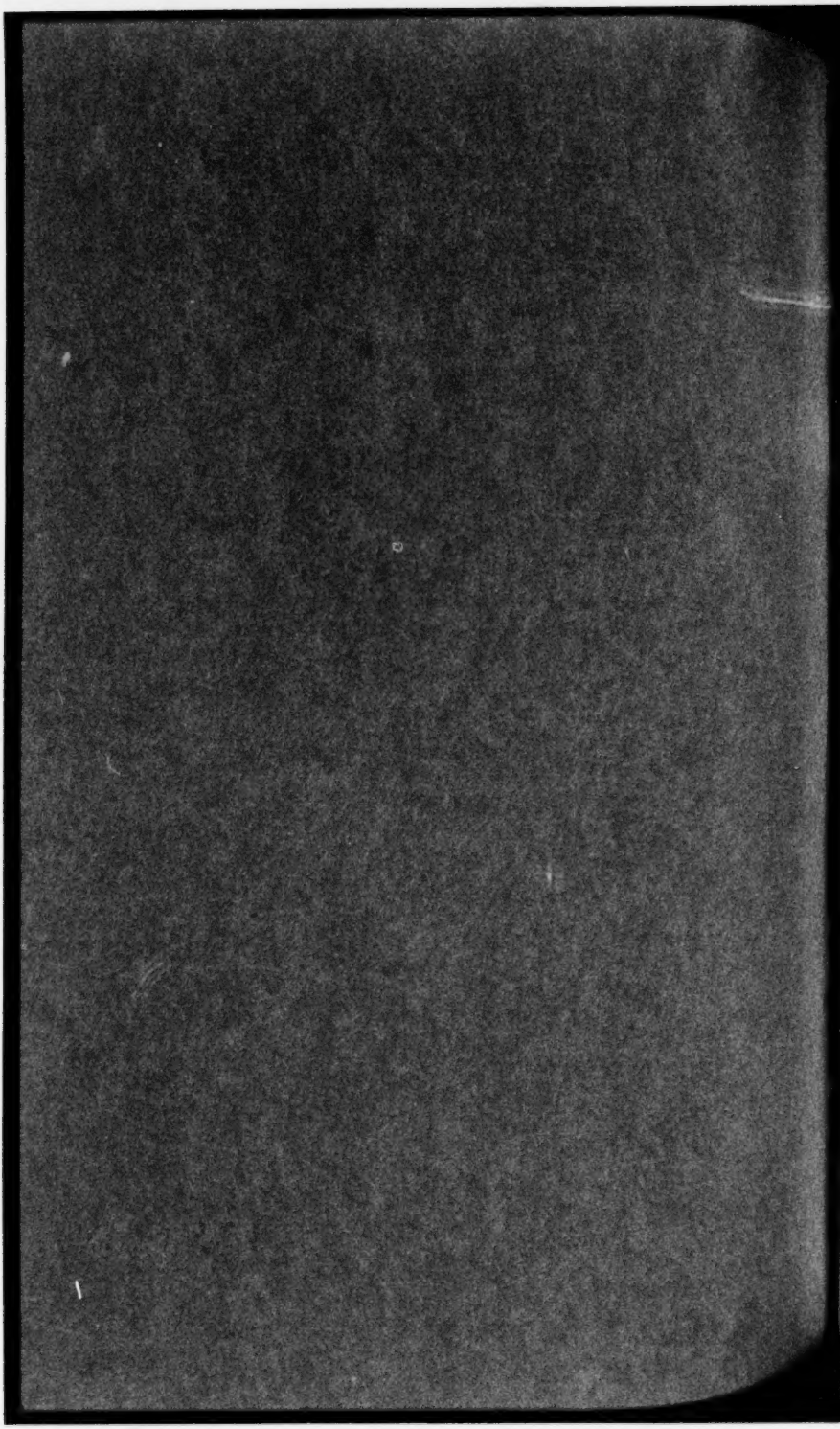
unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).



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STATUTE

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IN THE

Supreme Court of the United States

October Term, 1954.

No. 674

R. H. OSBRINK, M. E. OSBRINK, and BERTON W. BEALS, as Trustee, copartners, doing business under the firm name and style of R. H. Osbrink Manufacturing Company,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF PETITIONERS IN ANSWER TO BRIEF OF RESPONDENT.

Argument.

1. In its Brief Respondent, National Labor Relations Board (hereinafter referred to as the "Board"), argues that the Complaint allegations of independent violations of the Act are "related" to the allegations of the original charge and therefore are not barred by the six-month limitation period set forth in Section 10(b) of the Act. The Board in making that rationalization is obviously assuming that the several statements made by Derry Smith and Wally Watkins and which the Board found to be unfair labor practices (see Pet. p. 7) are involved in the

first question presented in the Petition. In fact, throughout its Brief the Board makes that assumption which we submit is clearly incorrect. The finding that the statements of Smith and Watkins were unfair labor practices was predicated completely upon the preliminary finding that those two individuals were supervisors within the meaning of the Act. The Petitioner was not held responsible for the statements upon any other ground or upon any other theory. The Court below clearly and emphatically held that Derry Smith and Wally Watkins were not supervisors within the meaning of the Act [R. 508-509, 510]. There cannot be the slightest question that the decision of the Court below rejected the finding of the Board that statements of Smith and Watkins were attributable to management.

However, as conceded in Respondent's Brief (p. 13, footnote 8), the first question presented in the Petition is the same even if the statements attributed to Petitioner through the medium of Smith and Watkins remain in the case. However, the first question would then involve the question of whether six findings were barred by the statute of limitations rather than merely one.

The Board's attempt (Resp. Br. p. 14) to rationalize the relationship between the enlarged allegations of the Complaint and the matter contained in the charge clearly demonstrate that the rule which the Board seeks to apply is that *any* new allegation is timely if it involves an employer as to whom *any* charge had been filed within the previous six months. The rationalization proceeds on the assumption that all matters involved in the case stem from Petitioner's "hostility" to the Union. The conclusion is made that therefore all things done are "related"; therefore the six months' period of limitation is circum-

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vented. If that be a sufficient standard to determine the application of the "relation back" rule, then the rule nullifies the six months' period of limitation.

2. The Board's Brief improperly characterizes the third question presented by the Petition as merely a question involving substantiality of evidence (Resp. Br. p. 15). The Petition makes it abundantly clear that no such question is presented [R. 20, 3 and 4]. The question presented is whether the Board may find that a discharge was illegally motivated where there is *no* affirmative evidence *at all* upon which to base a finding and where the finding is based *only* upon the negative inference arising from the Board's disbelief of the reasons for the discharge stated by Petitioner. The Board's Brief makes it evident that the question as so phrased is realistically asked. The only "affirmative evidence" which the Board in its Brief can find to cite (Resp. Br. p. 15) to the Court to discredit the third question presented by the Petition is that (i) LeFlore and Plummer were open and outstanding Union adherents, (ii) Petitioner was hostile to the organization of its employees, and (iii) the reasons offered for the discharge by Petitioner came either too late or were "trumped-up."

Thus, the "evidence" which the Board's Brief offers to support the finding amounts to no more than that Petitioner's reason for the discharge was not believed. Certainly it cannot be contended that a finding of illegal discharge may be predicated upon the fact that the discharged employee was an open Union adherent and that the employer preferred that its employees not be represented by a labor organization. It would be as logical to find that since taxpayers do not like taxes they there-

fore are found to be intentionally and illegally evading them.

Clearly, we submit that the unexplained and obvious failure of the Board's Brief to cite any *affirmative evidence* to support the Board's finding is a tacit admission that there is none in the record.

3. The Board's Brief attempts to dispose of the second question presented by the Petition by contending that the statements of Smith and Watkins are still valid and existing findings of unfair labor practices which remain in the case. The Board in considering this question attempts to justify that conclusion by arguing that while it is true that the Court below rejected the finding that those persons were supervisors, still the employer "may be" answerable on another and different theory. The theory which the Brief suggests is that the employees would believe that Smith and Watkins were speaking for management. That theory is clearly not presented in the case. The Board is now offering in its Brief in answer to the Petition an alternative ground upon which to base a finding when the finding involved was not made, or previously reviewed, upon the alternative ground. Clearly, the Court below did not make a finding on the ground suggested in Respondent's Brief. If it had done so, the Court would then have given consideration to the statements of Smith and Watkins, and the Court expressly stated that it was not giving any consideration to the statements of those persons [R. 510]. In fact, the Court could not find that the employees would assume that Smith and Watkins were speaking for management because of the obvious reason that the Court may not make findings in the first instance. A reading of the Court's Decision makes it abundantly clear that the Court was not attempt-

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ing to make findings such as suggested in Respondent's Brief. It also is manifest from the Court's Decision that it was proceeding on the basis that no further consideration or effect could be given to the statements made by Smith and Watkins.

4. The Board's Brief makes the surprising assumption that the fourth question presented by the Petition is not properly presented (Resp. Br. p. 3, footnote 1). The argument seems to be that representation proceedings are not subject to review. The cases cited for the proposition are clearly not in point.

N. L. R. B. v. Falk Corporation (1940), 308 U. S. 453, 84 L. Ed. 396, involved an attempt to review a direction of election, which is obviously not a final order. *General Drivers, Etc. v. N. L. R. B.* (C. A. 10, 1950), 179 F. 2d 492, involved an attempt to review the Board's refusal to certify a labor union as a bargaining representative after the union had lost the election. An unfair labor practice proceeding was not involved. *International Union, Etc. v. International Union, Etc.* (C. A. 8, 1949), 173 F. 2d 557, was an action to enjoin the holding of an election. Again an unfair labor practice proceeding was not involved.

The cases cited support the proposition that the findings made in a representation case may be reviewed in conjunction with an unfair labor practice proceeding where the findings made in the representation case are the basis of or incidental to the findings made in an unfair labor practice case. (See also: *A. F. of L. v. N. L. R. B.* (1940), 308 U. S. 401, 84 L. Ed. 347.) In the instant case, such a relation exists. The findings of interference which the Board used as a basis for setting aside the election were the same occurrences which it used

as the basis for its unfair labor practice findings. It would indeed be an anomaly to review those occurrences in so far as they apply to the unfair labor practice proceeding and not at the same time review them with respect to the representation proceeding. The cases cited above recognize that there can be no question but that the findings made in a representation case can be reviewed at least at some time.

All of which is respectfully submitted.

Dated: May 6, 1955.

HOMER D. CROTTY,
Attorney for Petitioners.

FRANK M. BENEDICT,
GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
Of Counsel.

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